V. DAVID, RE: EX P; UNITED ASIAN BANK BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[IN BANKRUPTCY NO. 1369 OF 1985]
15 OCTOBER 1990

BANKRUPTCY: *Creditor's petition - Words 'signed by petitioner in my presence' not in the note included in the petition - Signature of attorney and not creditor - Whether lawfully authorised - Non service of sealed copy - Whether defective - Mere irregularity - Substantial injustice - Remedy - Bankruptcy Rules 1969, rr. 99(1), 109, Bankruptcy Act 1967, s. 131.*

The judgment creditor sought to make receiving and adjudicating orders against the judgment debtor.

It was the contention of the debtor's Counsel that there were defects in the creditor's petition as firstly the words 'signed by petitioner in my presence' were not in the petition, secondly that the petition was signed by the judgment creditor's attorney instead of the creditor himself and thirdly that a sealed copy of the petition was not served on the judgment debtor.

The Court had to consider whether substantial injustice had been caused by their defects and whether the injustice could be remedied by the Court.

Held:

[1] Under r. 99(1) and Form 9 of the Bankruptcy Rules 1969 (the Rules), which should be construed strictly, when the petition is signed by the judgment creditor, it must be done in the presence of the witness; the absence of the words "signed by the petitioner in my presence" shows that this Rule was not complied with - and therefore, the creditor's petition is defective.

[2] There is no evidence in the petition that the person who signed the petition was lawfully authorised by the judgment creditor to sign the petition and there was also no evidence that the attorney was acting under a valid power of attorney; therefore the creditor's petition was also defective on this ground.

[3] Under r. 109 of the Rules, a sealed copy of the petition must be served on the debtor; as this was not done, the service of the petition was defective.

[4] Under s. 131 of the Bankruptcy Act 1967, the defects in (1) and (2) are serious defects and would cause substantial injustice - as these defects cannot be remedied by any order of the Court, the bankruptcy petition was dismissed.

[Petition dismissed.]

Case referred to:
Low Mun v. Chung Kiaw Bank Ltd. [1987] CLJ (Rep) 172

Legislation referred to:
Bankruptcy Act 1967, s. 131
Bankruptcy Rules 1969, rr. 99(1), 109, Form 9

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 3, p. 201

For the Petitioning Creditor - K.L Rekhraj; M/s. K.L Rekhraj
For the Judgment Debtor - M.S. Murthi; M/s. Murthi & Partners

JUDGMENT

Zakaria Yatim J:

In this creditor's petition, the judgment creditor, the United Asian Bank Berhad, is asking the Court to make receiving and adjudication orders against the judgment debtor on the ground that the judgment debtor has committed an act of bankruptcy, namely that the judgment debtor failed to comply with the requirements of the bankruptcy notice.

At the hearing of the petition, Mr. Murthi, Counsel for the judgment debtor submitted that the creditor's petition was defective. According to him the words "signed by the petitioner in my presence.." as contained in Form 9, were not included in the petition. I have examined the creditor's petition and I find those words are not written in the petition. At p. 2 of the creditor's petition there is the signature of the judgment creditor's attorney and the "signature of witness", Mr. Kesturi Lal Rekhraj, an advocate and solicitor, Kuala Lumpur. There is also the address of Messrs. Rekhraj Zaitoon & Associates, a firm of advocates and solicitors.

Rule 99(1) of the Bankruptcy Rules 1969 clearly states that

> Every petition shall be dated, signed and witnessed.

Under the rule, when the petition is signed by the judgment creditor, it must be done in the presence of the witness. The absence of the words "signed by the petitioner in my presence.." shows that the creditor's petition was not signed in the presence of the witness. In my view the creditor's petition is defective in that it fails to comply with r. 99(1) and Form 9. Rule 99(1) should be construed strictly. In *Low Mun v. Chung Kiaw Bank Ltd.* [1987] CLJ (Rep) 172, the Supreme Court said:

> since bankruptcy is entirely a creation of statute law, the rule of strict construction should be applied to the legislative words creating the act of bankruptcy.

Mr. Murthi further submitted that the creditor's petition was signed by the judgment creditor's attorney. In the creditor's petition it is the judgment creditor who asks the Court to make receiving and adjudication orders against the judgment debtor. Paragraph 1 of the creditors petition states:

> We, United Asian Bank Berhad, a company incorporated in the States of Malaya and having our registered office at Menara UAB, Jalan Tun Perak, Kuala Lumpur in the Federal Territory and a place of business among other places at Wisma MCIS, Jalan Barat, Petaling Jaya, hereby petition the Court that receiving and adjudication orders may be made in respect of the moveable and immovable estate of V. David.

The paragraph quoted above does not state that the creditor's petition is issued by an attorney on behalf of the judgment creditor. At p. 2 of the creditor's petition it is signed by the attorney as the petitioners. There is nothing in the creditor's petition that the attorney is authorised by the judgment creditor to sign the petition. There is also no evidence that the attorney is acting under a valid power of attorney. The Court is not satisfied that the person who signed the petition is lawfully authorised by the judgment creditor to sign the petition. On this ground too the creditor's petition is defective.

The next point raised by Mr. Murthi was that the judgment creditor did not serve a sealed copy of the creditor's petition on the judgment debtor. He referred to the affidavit of service affirmed by a clerk employed by Messrs. L.A. Rekhraj Zaitoon and Associates. The affidavit merely states that " a true copy" of the creditor's petition was served personally on the judgment debtor who acknowledged receipt of the petition. Mr. Murthi said that the affidavit

of service merely mentioned "a true copy" of the creditor's petition and not a sealed copy. Mr. Rekhraj, Counsel for the judgment creditor conceded that the affidavit of service mentioned only "a true copy" and not a sealed copy. He submitted that it was only a formal defect or a mere irregularity and did not invalidate the bankruptcy proceeding. Rule 109 of the Bankruptcy Rules states:

> A creditor's petition shall be personally serve and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a **sealed copy** of the petition to the debtor.
> (Emphasis added)

Halsbury's Laws of England, 4th Edn. Vol. 3 at p. 201 states:

> A creditor's petition must be personally served by delivering to the debtor a sealed copy of the filed petition.

It is clear that the creditor's petition and the service of the petition are defective. The question here is whether the bankruptcy proceeding is invalid because of these defects. Section 131 of the Bankruptcy Act 1967 states:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.

What the Court has to consider now is whether substantial injustice has been caused by these defects and that the injustice cannot be remedied by any order of this Court. In my opinion, in the absence of any proof, the creditor's petition was not signed by a person authorised by the judgment creditor. Furthermore the petition does not state that it was signed by the person in the presence of a witness. These are serious defects and substantial injustice would be caused by these defects. The injustice cannot be remedied by any order of this Court.

In the circumstances, I order that the petition be dismissed with costs.

Also found at [1991] 2 CLJ 1047